

In the High Court of Judicature at Madras

Dated: 10-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.108 OF 1997

Durai Elumalai

..Appellant/Defendant

vs.

N.Kamalammal

..Respondent/Plaintiff

This Second appeal was filed under section 100 of C.P.C.against the judgment and decree dated 28.03.1996 passed in A.S.No.23/94 on the file of the Additional Sub-Judge, Chengalpattu, confirming the judgment and decree dated 29.10.1993 passed in O.S.No.50/1992 on the file of the District Munsif, Maduranthakam.

For Appellant : Mr.M.S.Subramanian

For Respondent : Mr.K.Chandrasekaran
for Mr.T.Chezhiyan

This appeal has been preferred against the decree and judgment in A.S.No.23/1994 on the file of the Court of Additional Subordinate Judge, Chengalpattu. The Defendant in O.S.No.50/1992 on the file of the District Munsif, Maduranthakam, who has lost his defence in both the Courts below, is the appellant herein. The suit property is five cents of land in S.No.61/2B2 in Vilagam village.

2. The averments in the plaint relevant for the purpose of deciding this second appeal are as follows:-

The plaintiff is entitled to 84 cents in S.No.61/2B2. The plaintiff had executed a sale deed in the year 1971 in respect of 40 cents out of 84 cents in S.No.61/2B2 in favour of one Pachayammal. The plaintiff had executed another sale deed in respect of 4 cents in S.No.61/2B2 in the year 1973 in favour of one Venkatesa Pillai and in the year 1974, she had executed another sale deed in respect of the

remaining 40 cents in S.No.61/2B2. In the sale deed executed in the year 1973, survey number has been wrongly mentioned as S.No.61/1 instead of S.No.61/2B2. The four boundaries mentioned in the said sale deed is relating to S.No.61/2B2 and not for S.No.61/1. Pachayammal who had purchased 40 cents from the plaintiff in the year 1971 has also executed a sale deed in favour of Venkatesa Pillai. After the death of Venkatesa Pillai, his son Perumal is in possession and enjoyment of the entire extent of 84 cents in S.No.61/2B2, who has dug up a well and obtained electricity connection for the electricity motor pumpset in the same survey number property. The plaintiff has executed a sale deed in respect of S.NO.60/3A for an extent of 36 cents in favour of the defendants. The plaintiff has not executed any sale deed in respect of the S.No.61/2B2 in favour of the defendant. By playing fraud on the plaintiff, the defendant had clandestinely included S.No.61/2B2 for an extent of 5 cents in his sale deed. The said fact is known to the plaintiff only through the counter filed in I.A.No.266/90 in O.S.No.73/90. The plaintiff never executed any sale deed in respect of S.No.61/2B in favour of the defendant. Hence the suit for cancelling the sale deed dated 4.3.1980 in favour of the defendant.

3. The defendant in his written statement would contend that as per sale deed dated 4.3.1980, the defendant has purchased 36 cents in S.No.60/3 and 5 cents in S.No.61/2B2. The total extent of the S.No.61/2B2 is 85 cents. Out of the above said 85 cents, the plaintiff had executed a sale deed in respect of 40 cents in favour of Pachayammal in the year 1971 and the plaintiff executed a sale deed in respect of another 40 cents in favour of Venkatesa Pillai in the year 1974 and the remaining 5 cents was sold in favour of the defendant under sale deed dated 4.3.1980. The allegation in the plaint that by mistake the S.No.61/2B2 was included in the sale deed in favour of Venkatesa Pillai of the year 1974 instead of S.No.61/1 is denied as false. The averment in the plaint that the plaintiff came to know that S.No.61/2B2 has been mistakenly mentioned as survey number property sold under sale deed dated 4.3.1980 as S.No.61/1 and that she came to know about this fact only from the counter filed in an IA in O.S.No.73/1990 is also denied as false. The suit has been filed only at the instance of one Perumal. The suit is barred by limitation. The plaintiff has executed a sale deed in respect of 5 cents in favour of the defendant in respect of S.No.61/2B2 in Villagam village.

4. On the above pleadings the learned trial judge has framed three issues. The plaintiff has examined himself as P.W.1 and another witness Srimathi Mohana as P.W.2. No documentary evidence was marked on the side of the plaintiff. On the side of the defendant, the defendant examined himself as D.W.1 and Ex.B.1 to Ex.B.4 were marked. On the basis of the available documentary and oral evidence, the learned trial Judge has held that the plaintiff is

entitled to the relief as prayed for in the plaint and consequently decreed the suit setting aside the sale deed dated 4.3.1980 in favour of the defendant in respect of the S.No.61/2B2 measuring 5 cents. Aggrieved by the findings of the learned District Munsif, the Defendant has preferred the appeal in A.S.No.23/1994 before the Additional Sub-Judge, Chengalpattu, who has also dismissed the appeal confirming the decree and judgment of the trial Court. Hence, the second appeal before this Court by the defendant in O.S.No.50/1992.

5. The substantial question of law involved in this second appeal is as follows:

"In the facts and circumstances of the case that Kamalammal was entitled to 85 cents in S.No.61/2B2 and she having sold only 40 cents and another 40 cents and 4 cents to Venkatesa Pillai and therefore she havng a remaining one cent of land in S.No.61/2B2, is not the appellant entitled to right and title in respect of the said one cent of land?"

5.The point:-

5(a) It is the definite case of the plaintiff/respondent herein that she had executed a sale deed in favour of Venkatesa Pillai in the year 1973 only in respect of 5 cents in S.No.61/2B2, but it has wrongly been mentioned in the sale deed as S.No.61/1 instead of S.No.61/2B. The suit was filed to set aside the sale deed dated 4.3.1980 in favour of the defendant in respect of 5 cents in S.No.61/2B2. It is seen from the judgment of the trial Court that the son of Venkatesa Pillai by name Perumal had filed O.S.No.73/1990 for injunction claiming that he is in possession of the entire extent of 84 cents in S.No.61/2B under the sale deed executed by the plaintiff in the year 1974 in favour of his father Venkatesa Pillai and also under the sale deed of the year 1973 in respect of 4 cents in S.No.61/2B2. The said Perumal, son of Venkatesa Pillai, had purchased 40 cents in S.No.61/2B2 from Pachayammal on 30.5.1989. The suit filed by Perumal in O.S.No.73/1990 was for injunction against the defendant-Durai Elumalai(appellant herein) was also decreed as seen from the judgment in O.S.No.50/1992. Both the Courts below have set aside the sale deed dated 4.3.1980 which was exhibited as Ex.B.1 in O.S.No.50/1992 on the ground that S.No.61/2B2 was wrongly been mentioned as S.No.61/1. But the said sale deed dated 4.3.1980 has been produced only by the defendant and marked as Ex.B.1. Four boundaries have been given in Ex.B.1 for the properties sold under Ex.B.1. There are two survey number properties have been sold under Ex.B.1. One is Nanja land in S.N.60/3A measuring 55 cents which is not the subject matter of the suit. The other property is 5 cents out of 85 cents in S.No.61/2B2. So as per Ex.B.1, the total extent of S.No.61/2B2 is 85 cents, whereas according to the plaintiff

and as per the averments in the plaint in O.S.No.50/1992 the total extent of the S.No.61/2B2 is only 84 cents and that the plaintiff had executed sale deed for 40 cents in S.No.61/2B2 in the 1971 in favour of Pachayammal and another 40 cents in S.No.61/2B2 in favour of Venkatesa Pillai in the 1974 and 4 cents in the year 1973 in S.No.61/2B2 in favour of Venkatesa Pillai. Ex.B.1 is in favour of the defendant. The four boundaries given under Ex.B.1 for S.No.61/2B2 runs as follows:-

"South of the land belong to Venkatesa Pillai, West of the land belong to Pachayammal, North of the Villagam chanel, East of the land belong to Venkatesa Pillai measuring 5 cents out of 85 cents."

It is the case of the plaintiff that S.No.61/1 has been wrongly mentioned in the sale deed executed in favour of Venkatesa Pillai in the year 1973 in stead of S.No.61/2B2. But the sale deed of the year 1971 said to have been executed in favour of Venkatesa Pillai was not produced in O.S.NO.50.1992.

5(b) The learned counsel appearing for the appellant would contend that in pursuance of Ex.B.1-sale deed dated 4.3.1980, the predecessor in title in respect of S.No.61/2B2 has handed over Ex.B.2 parent document under Ex.B.2 dated 9.7.1963 to the defendant. It is seen from Ex.B.2 that out of the total extent of 2 acres and 21 cents in S.No.61/2B2, 85 cents was sold to Kamalammal, the plaintiff in O.S.No.50/92. There is no document produced by either parties before the trial Court to show the boundaries for four cents sold under 1973 sale deed. According to the plaintiff only 4 cents in S.NO.61/2B2 was sold under 1973 document to Venkatesa Pillai. But survey number has been wrongly mentioned as S.No.61/1. There is no document to show the boundaries for S.No.61/1. If four boundaries for S.No.61/1 for the land sold under 1973 document was correctly mentioned in the sale deed then it cannot be said that sale deed of the year 1973 in respect of 4 cents relating to S.No.61/1 and in the absence of any document to show the boundaries of S.No.61/1, it cannot be said that the land sold under 1973 document in favour of Venkatesa Pillai in respect of 4 cents is relating to S.No.61/2B2. Even the sale deed of the year 1973 in favour of Venkatesa Pillai for 4 cents was not produced before the trial Court to ascertain, whether four cents in S.No.61/2B2 was sold to Venkatesa Pillai under 1973 document or the extent of 4 cents sold to Venkatesa Pillai was in S.No.61/1. The learned counsel for the appellant would contend that even at the worst if the case of the plaintiff/respondent is true, the sale deeds in favour of Venkatesa Pillai and Pachayammal will comprise only to an extent of 84 cents, but even as per the document under Ex.B2 belonging to predecessor in title the total extent of the S.No.61/2B comes to 85 cents, out of 2 acres 21 cents and not 84 cents as contended by the plaintiff in O.S.No.50/1992 and the sale deed under

Ex.B.1 will be valid atleast for one cent. Under such circumstances, the findings of both the Courts below setting aside the sale deed-Ex.B.1 in entirety cannot be upheld. The learned counsel appearing for the respondent undertakes that if an opportunity is given to the respondent/plaintiff, she will produce the copy of the sale deed of the year 1973 in favour of Venkatesa Pillai in respect of 4 cents and also other documents relating to show the boundaries of S.No.61/1 and submits that an opportunity may be given to the respondent-plaintiff to prove her case that boundaries for S.No.61/1 entirely differs from the boundaries given for 4 cents in the sale deed of the year 1973 in favour of Venkatesa Pillai. Under such circumstances, both the learned counsel agree for the matter is being remanded to the first appellate Court to decide whether the boundaries mentioned in 1973 document for 4 cents in favour of Venkatesa Pillai is relating to S.No.61/1 or S.No.61/2B2 and whether the defendant is entitled to one cent in S.No.61/2B2 under Ex.B.1-sale deed. Point is answered accordingly.

6. In the result, the appeal is allowed and the decree and judgment in A.S.No.23/1994 on the file of the Court of Additional Sub-Judge, Chengalpattu, is set aside and the matter is remanded to the first appellate Court for the following purpose:-

i) to decide whether the defendant is entitled to one cent in S.No.61/2B2.

ii) Whether the sale deed in respect of 4 cents in favour of Venkatesa Pillai of the year 1973, comes within the boundaries of S.No.61/1 or for S.No.61/2B2.

The first appellate Court is directed to dispose of the appeal within two months from the date of receipt of a copy of this judgment. The respondent/plaintiff is entitled to filed registered copy of the sale deed of the year 1973 in favour of Venkatesa Pillai and also documents to show the boundaries for S.No.61/1. The costs will abide by the result of the first appeal.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

SSV

To

1.The Additional Sub-Judge, Chengalpattu.

2.The District Munsif, Maduranthakam.

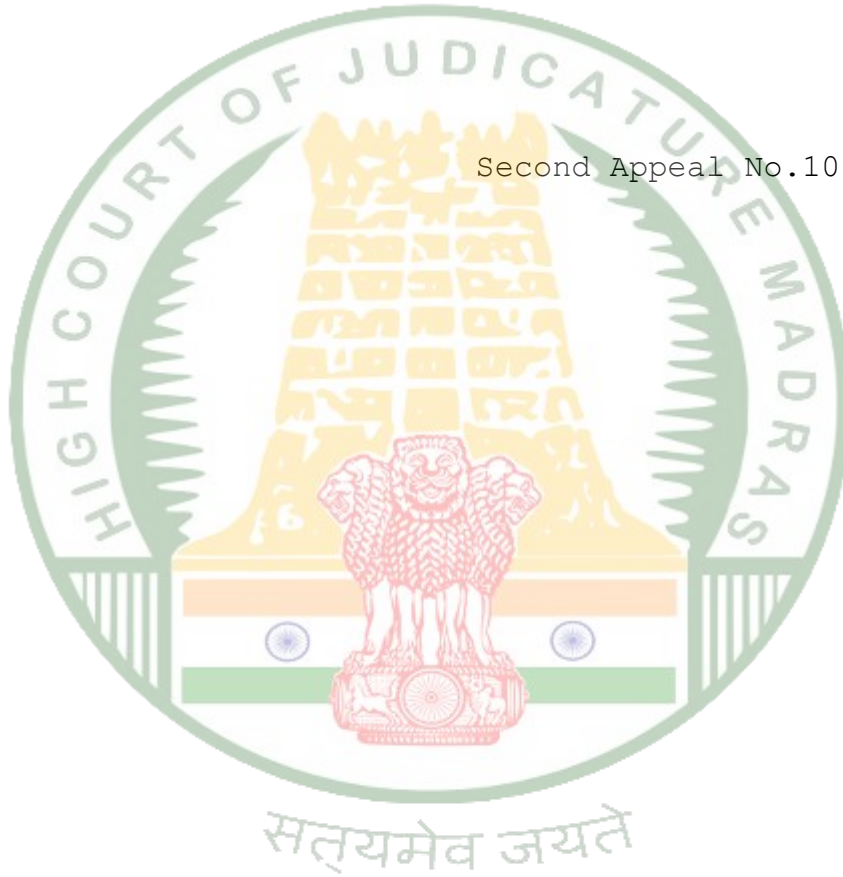
3.The Section Officer,
VR Section, High Court, Madras-104.

+1cc to Mr.K.Chandrasekaran, Advocate Sr 2167

+1cc to Mr.M.S.Subramanian, Advocate Sr 2051

SGL (CO)
km/2.2.

Second Appeal No.108 of 1997



WEB COPY